

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT THE SEATTLE COURTHOUSE

AMERICAN AUTOMOBILE INSURANCE
COMPANY, a Missouri corporation, as
subrogee of Brue and Natalie Elert,

Plaintiffs,

vs.

PERFORMANCE COATINGS, INC. d/b/a,
PENOFIN, California corporation,

Defendants.

NO.

NOTICE OF REMOVAL

(DIVERSITY/FEDERAL QUESTION)

(CLERK'S ACTION REQUIRED)

TO: ALL PARTIES HEREIN AND TO THEIR RESPECTIVE
COUNSEL OF RECORD

AND TO: THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

PLEASE TAKE NOTICE that Defendant Performance Coatings, Inc. d/b/a Penofin, a
California corporation ("Penofin" or "Defendant") by and through its attorneys, hereby remove
this civil action to the United States District Court for the Western District of Washington from
the Superior Court of the State of Washington in and for the County of King pursuant to 28
U.S.C. §§ 1331, 1332, 1337, 1441, and 1446, whereby this Court has subject matter jurisdiction,

NOTICE OF REMOVAL
(DIVERSITY/FEDERAL QUESTION) -1

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1 because there is diversity among the parties, the claims are in excess of \$75,000.00, and the
2 claims asserted by Plaintiff are preempted under federal law and regulations of commerce. The
3 grounds for removal are more particularly stated as follows:

4 1. The above-entitled action was commenced in the Superior Court of King County,
5 State of Washington, on April 18, 2018. A copy of the Complaint is attached as Exhibit A to the
6 Declaration of Kevin Craig (“Craig Decl.”).

7 2. Plaintiff American Automobile Insurance Company, a Missouri corporation, as
8 subrogee of Brue and Natalie Elert (“AAIC” or “Plaintiff”) filed this subrogation lawsuit against
9 Penofin based on allegations that the Elerts’ home located at 8806 Southeast 59th Street, Mercer
10 Island, Washington 98040 sustained fire damage caused by the spontaneous combustion of stain
11 rags used to apply Penofin Verde brand wood finish, which were subsequently left unattended in
12 the garage. Craig Decl. Ex. A, ¶¶ 4, 8, 10.

13 3. The Summons and Complaint was served upon Defendant by personal service on
14 or about April 27, 2018. *See* Craig Decl. Exhibit B.

15 4. The above-captioned action is a civil case over which this Court has jurisdiction
16 pursuant to 28 U.S.C. § 1332, in that:

17 a. Plaintiff is a Missouri corporation with its principal place of business in Illinois.
18 *See* Craig Decl. Exhibit C (AAIC’s 2018 Annual Registration Report filed with
19 the Missouri Secretary of State¹);

20 b. Defendant Specialty Coatings, Inc. d/b/a Penofin is a California corporation with
21 its principal place of business in California. *See* Craig Decl. Exhibit D (Penofin’s
22 2017 Statement of Information filed with the Secretary of State of California);

23 c. The matter in controversy exceeds the sum or value of \$75,000, exclusive of
24

25 ¹ Plaintiff alleges in the Complaint that its principal place of business is in Missouri; however, this does not change
26 the removal analysis as it pertains to diversity among the parties. *See* Craig Decl. Ex. A, ¶ 1.

1 interest and costs. *See* Craig Decl. Ex. A, ¶¶ 14, 24, 29.

2 d. Therefore, this Court has diversity jurisdiction over the above-captioned action
3 pursuant to 28 U.S.C. § 1332, which may properly be removed to this Court
4 pursuant to 28 U.S.C. § 1441.

5 5. In addition, during the relevant time period cans of Penofin Verde wood finish
6 contained warnings in compliance with the regulations promulgated by the Consumer Product
7 Safety Commission (“Commission”) pursuant to the Federal Hazardous Substances Act
8 (“FHSA”) 15 U.S.C. §1261-1278. Plaintiff’s state law tort claims are therefore preempted by
9 federal law.

10 6. Penofin Verde wood finish is a hazardous substance subject to the FHSA. The
11 FHSA defines “hazardous substances” to include:

12 [a]ny substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii)
13 is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi)
14 generates pressure through decomposition, heat, or other means, if such substance
15 or mixture of substances may cause substantial personal injury or substantial
16 illness during or as a proximate result of any customary or reasonably
foreseeable handling or use, including reasonably foreseeable ingestion by
children.

17 15 U.S.C. § 1261(f).

18 7. Plaintiff’s allegations that the can of Penofin Verde wood finish “presents a
19 unique and latent hazard of spontaneous combustion due to its chemical formulation” and that
20 “adequate warnings and instructions were not provided, displayed, and/or located in such a
21 manner as to sufficient warn and instruct users of the risk of fire” fall squarely within the
22 purpose and scope of the FHSA. *See* Craig Decl. Ex. A, ¶¶ 20-24. The adequacy of warning
23 labels affixed to cans of flammable wood finish is purely a question of federal law.

24 8. Thus, in the alternative to diversity jurisdiction, the above-captioned action is a
25 civil case over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 in that

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1 the sufficiency of warning labels affixed to Penofin Verde wood finish fall under the authority of
2 the Commission pursuant to 15 U.S.C. § 1269(a) of the FHSA and that this action arises under
3 the laws of the United States, specifically an Act of Congress regulating commerce.

4 9. This Notice of Removal is filed within the time provided by 28 U.S.C. § 1446(b)
5 and the Federal Rules of Civil Procedure.

6 10. Removal to this Court is proper under 28 U.S.C. § 1441(a) because the State
7 Court is located within the jurisdiction of this District.

8 11. Upon the filing of this Notice of Removal, Defendant shall give written notice
9 thereof to Mark S. Anderson, Esq., and Avin Singh, Esq., counsels for Plaintiff, and Defendant
10 shall file copies of said Notice and Notice of Filing of Removal with the King County Superior
11 Court for the State of Washington.

12 12. By filing this notice, Defendants do not waive any defenses which may be made
13 available to it, specifically including, but not limited to, improper service and the absence of
14 venue in this Court or in the Court from which this action has been removed.

15 WHEREFORE, Defendant respectfully requests that the Court remove the above-
16 captioned action now pending against it in the King County Superior Court for the State of
17 Washington, to the United States District Court for the Western District of Washington at
18 Seattle, wherein it shall proceed as an action originally commenced therein.

19 DATED this 25th day of May, 2018.

20 GORDON REES SCULLY
21 MANSUKHANI, LLP

22 /s/ Kevin J. Craig
23 Kevin J. Craig, WSBA No. 29932
24 Trevor J. Mohr, WSBA No. 51857
25 Attorneys for Defendant Performance
26 Coatings, Inc. d/b/a Penofin, a California
corporation

NOTICE OF REMOVAL
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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on this date I filed a copy of the foregoing document with the Clerk of the Court and served via e-mail and U.S. Mail on all counsel of record, addressed as follows:

Attorneys for Plaintiff

Mark S. Anderson
Avin Singh
Offices of Cozen O'Connor
999 Third Avenue, Suite 1900
Seattle, WA 98104
manderson@cozen.com
avins08@yahoo.com

DATED this 25th day of May 2018.

/s/ Angela Marino

Angela Marino

NOTICE OF REMOVAL
(DIVERSITY/FEDERAL QUESTION) -5

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